U.S. CHAMBER OF COMMERCE

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Consumer Financial Protection Bureau
Attention: Matthew Burton & PRA Office
1700 G Street, NW
Washington, DC 20552

Re: "*Telephone Survey Exploring Consumer Awareness of and Perceptions Regarding Dispute Resolution Provisions in Credit Card Agreements*"
Docket No. CFPB-2013-0016

Dear Mr. Burton and the PRA Office:

These comments are submitted on behalf of the U.S. Chamber of Commerce Center for Capital Markets Competitiveness ("CCMC") and the U.S. Chamber Institute for Legal Reform ("ILR"). The U.S. Chamber of Commerce (the "Chamber") is the world's largest business federation, representing the interests of more than three million companies of every size, sector, and region. The Chamber created CCMC to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. ILR is an affiliate of the Chamber dedicated to making our nation's overall civil legal system simpler, faster, and fair for all participants.

We appreciate the opportunity to submit this letter addressing your request for information related to your proposed survey of "consumer awareness of dispute resolution provisions in their agreements with credit card providers," and "[w]ays to enhance the quality, utility, and clarity of the information to be collected." 78 Fed. Reg. 34352, 34352 (June 7, 2013).

As we previously explained in comments submitted to the Consumer Protection Bureau ("Bureau"),[1] the availability of arbitration as a system for resolving disputes expeditiously and fairly is extremely important to both businesses and their customers. Arbitration of consumer disputes has been common practice for decades; there are

[1] Letter from David Hirschmann and Lisa Rickard to Monica Jackson, *Re: Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, Docket No. CFPB-2012-0017* (June 12, 2012), *available at* http://www.instituteforlegalreform.com/sites/default/files/CFPB_Comments.pdf.

perhaps hundreds of millions of consumer contracts currently in force that include arbitration agreements—many of them relating to consumer financial products or services.

The study authorized in Section 1028(a) of the Dodd-Frank Act obligates the Bureau to examine the extent to which various dispute resolution systems provide consumers with an effective means of resolving disputes—not theoretically, but based on the way these systems operate in the real world. That requires the Bureau to consider not only arbitration, but also the dispute resolution system that would apply if arbitration were prohibited or limited—the judicial system. Congress recognized as much in section 1028(a) of the Dodd-Frank Act, which provides that the Bureau "shall conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services."[2] In the very next provision, Section 1028(b), Congress made clear that this study has a particular purpose: "The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, *if* the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers. The findings in such rule *shall be consistent with the study* conducted under subsection (a)."[3]

More than a year ago, the Bureau solicited comments in connection with the design of that mandated study.[4] In comments responding to that request, we explained that the Bureau must assess both arbitration *and* litigation in court—the system of dispute resolution to which consumers would be relegated in the absence of arbitration—in order to produce a study satisfying Congress' mandate.[5]

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[2] 12 U.S.C. § 5518(a).

[3] *Id.* § 5518(b) (emphasis added).

[4] *Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements*, Docket No. CFPB-2012-0017, 77 Fed. Reg. 25148 (Apr. 27, 2012).

[5] As ILR and CCMC observed, the D.C. Circuit recently confirmed that an agency's failure to provide a sufficiently rigorous assessment of the costs and benefits will send the rulemaking process back to square one. *See* Hirschmann and Rickard Letter, *supra* note 1, at 6-8 (citing *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011)). As with the Securities and Exchange Commission rule relating to corporate proxy elections that the D.C. Circuit rejected as arbitrary and capricious in *Business Roundtable*, the Bureau cannot regulate without first "examin[ing] the relevant data and articulat[ing] a satisfactory explanation for its action including a rational connection between the facts found and the

In order for the Bureau to assess these benefits and costs, ILR and CCMC identified in their comment a number of substantive topics that the study should encompass:

- *The nature of consumer claims*. The study should identify the types of disputes that arise in the consumer—financial product/service provider relationship, and the frequency with which these different categories of claims occur.

- *Accessibility of each type of dispute resolution forum*. The study should assess the ability of parties to access a given forum effectively with respect to each category of claim identified by the Bureau—***taking account of real-world conditions, not idealized theory***.

- *Outcomes in arbitration versus litigation*. The study should analyze whether and if so, how, arbitration outcomes compare to litigation outcomes for like claims.

- *Class proceedings*. The study should assess the relief ***actually available*** in arbitration and in judicial litigation with respect to small claims that are susceptible to class treatment in court. That requires an examination of the extent to which allegedly injured consumers actually obtain ***tangible*** benefits from claims asserted in class proceedings in court.

- *Differences in cost burden for consumers*. The study should identify the differences in the cost to consumers in accessing and obtaining a decision in arbitration as compared to litigation in courts.

- *Differences in cost burden for businesses*. The study should identify any difference in cost for businesses from arbitration as compared to judicial litigation, and the extent to which that cost burden relates to awards in meritorious cases on the one hand, or increased litigation costs and settlements of questionable cases on the other. The study should also examine the effect of any such cost differentials on the cost and availability of consumer financial products and services.

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choices made." 647 F.3d at 1148. Because any regulation of arbitration agreements would have the predictable and inevitable effect of forcing certain disputes into the litigation system in general (and into class action lawsuits in particular), data relating to litigation in courts—especially class actions—is unquestionably "relevant" to such regulation. And it goes without saying that the Bureau cannot connect the "facts found" concerning the litigation system with its future regulatory "choices made" if it does not develop those facts.

- *Practical effect of requiring that arbitration agreements be entered into "post-dispute" only*. The study should examine whether prohibiting pre-dispute arbitration agreements will, as a practical matter, eliminate recourse to arbitration, or whether consumers and businesses will still agree to utilize arbitration in a significant number of cases.

- *Examine trade-offs*. The study should identify the potential consequences of various regulatory approaches. For example, a regulation invalidating arbitration agreements that prohibit class proceedings would have the effect of eliminating consumers' ability to bring small, individualized claims in arbitration—because it would, as a practical matter, eliminate pre-dispute arbitration clauses. The study must consider whether the class proceedings provide a benefit that is worth that cost.

As that comment indicated, the Bureau must collect information that addresses the concrete, objective benefits and costs of arbitration to consumers and covered persons, in comparison with the costs and benefits of litigation. Only if the Bureau has that information can it determine whether it is appropriate to initiate a rulemaking process that is consistent with the Dodd-Frank Act's mandate that any regulation be both in the public interest and supported by this study's findings.

ILR and CCMC explained in the earlier comment that the existing *empirical* literature reveals that arbitration provides consumers with fast, inexpensive, and fair access to a neutral decision maker for resolving their disputes. That literature also reveals that consumers obtain outcomes that are comparable or superior to what they would obtain seeking redress through our overburdened court system. To the extent the Bureau deems that data insufficient, however, it must collect additional information regarding all aspects of the relevant subjects. In that connection, it is striking that there is much less empirical information regarding the relevant aspects of the litigation system than there is regarding arbitration.

Although a number of comments, including those submitted by ILR and CCMC, suggested that the Bureau formulate a study plan identifying the empirical questions it planned to examine and then solicit comment on those questions—including submission of existing studies as well as new empirical information—the Bureau has not done so. Indeed, the Bureau has provided the public with no information whatsoever explaining how it is undertaking the congressionally mandated study. That makes it extremely

difficult for interested parties to determine what information would be relevant to the Bureau's study process.

We again respectfully urge the Bureau to provide some minimal transparency regarding its study plan in order to enable interested parties to provide relevant information and prevent the Bureau from producing a study that lacks credibility—and wastes taxpayer dollars[6]—because it was produced in an informational vacuum. Although the Bureau surely possesses or can retain able staff and consultants, there is a wealth of information regarding both judicial litigation and arbitration that has been developed, and could be developed, that is highly relevant to the subject of the Bureau's study.

Instead of providing the public with some information regarding the Bureau's study plan, the Bureau's latest request for information is focused only on its proposed consumer survey—and has been issued only because such a request is required by law. Unfortunately, the Bureau has again missed an opportunity to provide transparency regarding its general approach to conducting this study. Moreover, the Bureau's latest request for information—in response to which we submit this comment—has effectively ignored the previously submitted recommendations. Instead, the Bureau has proposed a telephonic survey that will consume significant taxpayer dollars, impose an unjustified burden on individuals asked to respond to the survey, and produce responses that would not only be irrelevant to answering the questions posed by Dodd-Frank's mandate, but would also risk generating misleading results that could be misused in public policy debates about arbitration.

The stated purpose behind the Bureau's request for information is to secure Office of Management and Budget ("OMB") approval of the information collection. To obtain that approval, the Bureau must "demonstrate that it has taken every reasonable step to ensure that the proposed collection of information:

[6] The CFPB receives its funds from the Board of Governors of the Federal Reserve, not through the appropriation process. But any unnecessary or unjustified spending by the Bureau directly increases the deficit—and therefore the burden on taxpayers—because any funds used by the Bureau "would otherwise have been forwarded from the Federal Reserve to the Treasury, where they could have been used to pay for other expenditures or to reduce the debt." H.R. Rep. No. 112-470, at 158 (2012).

> "(i) Is the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives;
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> "(ii) Is not duplicative of information otherwise accessible to the agency; and
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> "(iii) Has practical utility."[7]

The proposed survey instrument falls far short of meeting these requirements for approval. The questions will impose an undue burden on respondents to gather the requested information—and that information is irrelevant to determining whether regulation of arbitration would be "in the public interest and for the protection of consumers." And for much the same reason, questions that seek to elicit consumers' uninformed assessments of dispute resolution options have minimal or no bearing on how arbitration in practice operates.[8] Accordingly, the survey has no practical utility whatsoever.

Even if the OMB ultimately approves this collection of information, the survey will not address the Dodd-Frank Act's mandate, and the Bureau will end up risking costly court challenges and prolonged uncertainty as to the eventual fate of the proposed rules. As the Committee on Capital Markets Regulation has warned, "It would be an unfortunate outcome if after the Dodd-Frank rulemaking process has run its course for several years, much of the rulemaking is invalidated because of its inadequate cost-benefit analysis."[9]

Our comments address the proposed survey's shortcomings, and therefore focus on two fundamental points:

- The Bureau's planned collection of information is not a sensible use of taxpayer resources and is an unjustified intrusion on the time of potential survey

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[7] 5 C.F.R. § 1320.5(d)(1) & (d)(1)(i)-(iii).

[8] We use the term "uninformed" to describe assessments by consumers that will be based on a lack of all (or virtually all) information that is relevant to answering the question posed.

[9] Letter from the Committee on Capital Markets Regulation to Sen. Timothy Johnson, Sen. Richard Shelby, Rep. Spencer Bachus, and Rep. Barney Frank at 6 (Mar. 7, 2012), *available at* http://capmktsreg.org/2012/03/lack-of-cost-benefit-analysis-in-dodd-frank-rulemaking/.

respondents. Under the Dodd-Frank Act, any proposed future rulemaking would have to address whether limiting or restricting arbitration would serve the public interest and consumer protection. As we have explained, that question depends on the actual benefits consumers derive from arbitration as compared to judicial litigation. It is inconceivable that respondents selected at random could possibly have sufficient information and experience with dispute-resolution mechanisms to assess arbitration and litigation on an objective basis, and respondents' uninformed views are not at all relevant to answering that question.

Rather than spending valuable taxpayer dollars to elicit responses that will in no way assist the Bureau in fulfilling its statutory mandate, the Bureau should develop the objective, factual information relevant to assessing arbitration's benefits and costs compared to the overburdened judicial system—which depend on the inquiries outlined above.

- If the Bureau nonetheless determines to proceed with a telephonic survey, it must ensure that the survey imposes the least possible burden on respondents and seeks information that is at least potentially within the knowledge of consumers and therefore has practical utility. The proposed questions fail that test: they are certain to impose an unnecessary and unjustified burden and have no practical utility for answering the Dodd-Frank Act's mandate.

  Any consumer survey should address only information that there is at least some possibility that consumers will possess. In this context, that would be limited to ***consumers' awareness of dispute resolution provisions*** in card agreements. Of course, such questions remain irrelevant to the objective question of arbitration's effectiveness. Moreover, in order to elicit useful information, it will be essential that the Bureau also obtain information about consumers' baseline level of knowledge about other key provisions of their card agreements so that it can place information regarding dispute resolution systems in context and thereby derive information that is therefore relevant to the question of consumer awareness. As we explain below in elaborating our comments on specific survey procedures and questions, by limiting the scope of the survey the Bureau can lessen the burden on respondents while reducing the cost of the survey by avoiding questions that cannot produce any useful information.

I. Because The Relevant Issue Is Whether Regulating Pre-Dispute Arbitration Agreements Would Be In The Public Interest And For The Protection Of Consumers, The Bureau Should Not Ask Survey Questions Seeking Consumers' Insufficiently Informed and Subjective Assessments of Dispute Resolution Clauses And Systems.

The questions posed in the proposed Supporting Statements to the Bureau's Information Collection Request seek data about consumers' perceptions and assessments of dispute-resolution provisions in their credit card agreements. In particular, the Bureau's questions seek information about—among other things—consumer respondents' perceptions of the dispute resolution options available to them, knowledge of the provisions of credit-card agreements they have entered into, and their beliefs about the attributes of different forms of dispute resolution. The Bureau's proposed information collection is certain to impose unnecessary and unjustified burdens on respondents. Moreover, the survey instrument will collect information that has no practical utility, for two reasons: the collected information will not address the statutory mandate, and will in any event be useless in answering any serious inquiry about the relative benefits and costs of different dispute resolution systems.

The Bureau's statutory mandate under the Dodd-Frank Act is to determine whether it would be "in the public interest" and would serve "the protection of consumers" to place "a prohibition or imposition of conditions or limitations" on the use of pre-dispute arbitration agreements in connection with contracts "between a covered person and a consumer for a consumer financial product or service."[10] The Bureau must support any rulemaking on that question with findings that are "consistent with the study" authorized by the Dodd-Frank Act.[11]

For that reason, it is imperative that the study examine the effectiveness, efficiency, and fairness of arbitration and judicial litigation to consumers and covered persons alike. Those are empirical questions with straightforward and objective answers. Indeed, as we explained above (*see* pages 3-4), the comment previously submitted by ILR and CCMC laid out a number of categories of specific, substantive issues that an appropriate study would have to consider. That comment, moreover, broke down those

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[10] 12 U.S.C. § 5518(b).

[11] *Id.*

categories to explain in more detail the empirical questions that the Bureau should have taken into account in designing this study.

There already is a good deal of empirical research on how arbitration stacks up against litigation.[12] Those data demonstrate that arbitration is faster and cheaper than litigation, and that it is more likely to result in positive outcomes for consumers and employees.[13] Research of this sort is plainly relevant to the Bureau's statutory mandate, because it addresses whether arbitration serves the public interest, and whether it makes individuals and businesses alike better off by reducing the transaction costs of resolving their disputes fairly before a neutral decision-maker.

But there exists plenty of room for good, useful collection of nonduplicative information addressing consumers' comparative outcomes in arbitration and in litigation—particularly with respect to the accessibility of judicial litigation for the types of injuries suffered by consumers and the benefits actually obtained by consumers, if any, as a result of such litigation. In order to inform the Bureau's future regulatory choices helpfully, the research would have to take into account, for example: the comparative transaction costs of resolving a dispute in each forum; the speculative likelihood of

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[12] Information Collection Request, Supporting Statement A at 6.

[13] *See, e.g.* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RIGHTS L. REV. 29, 48 tbl. 1 (1998) (comparing results in employment arbitration with results in federal court during the same period of time and finding that employees won 63% of cases in arbitration compared to 15% in federal court); George W. Baxter, *Arbitration in Litigation for Employment Civil Rights?*, 2 VOL. OF INDIVIDUAL EMPLOYEE RIGHTS 19 (1993-94) (finding that employees won 51% of arbitrations while the EEOC won 24% of cases in federal court); William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, 50 DISP. RES. J., Oct.-Dec. 1995, at 40 (reporting that employees won 68% of the time before the AAA as contrasted with only 28% of the time in litigation); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J., Nov. 2003 - Jan 2004, at 44 (finding that higher-compensated employees obtained slightly higher awards in arbitration before the AAA than in court; the authors determined that there was insufficient court data to make a similar comparison for employees with less than $60,000 of annual income—indicating that such employees may be experiencing difficulty finding lawyers who will represent them in court); Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 DISP. RESOL. J., Nov. 2003 - Jan. 2004, at 56 (comparing the results of employment discrimination cases filed and resolved between 1997 and 2001 in the S.D.N.Y. versus with the NASD and NYSE arbitration forums and finding that employees prevailed 33.6% of the time in court versus 46% of the time in arbitration); Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. DISP. RESOL. 777 (2003) (finding that employees with promulgated agreements have a win rate of 34% in arbitration and that 72% of such employees did not earn enough income to gain access to the courts with an employment-related claim); Howard, *Arbitrating Claims of Employment Discrimination, supra* (comparing litigation and arbitration in the securities industry from 1992-94; determining that employees won 28% of non-jury trials, 38% of jury trials, and 48% of arbitrations).

recovering anything at all in a putative class action lawsuit; or the fact that arbitration agreements are not all alike and may offer different consumer-friendly features.

Rather than using its resources to try to obtain this empirical information, the Bureau has chosen to focus instead on "consumer awareness and assessment of arbitration provisions, including consumer awareness when choosing credit card products."[14] The Bureau has justified this choice by explaining that it seeks to avoid "duplicat[ing] previous studies."[15] Although one relevant factor for OMB approval is that the information sought to be collected "[i]s not duplicative of information otherwise accessible to the agency,"[16] that requirement does not give the Bureau a blank check to produce a survey that will collect information that may be nonduplicative but will not yield any useful data for researchers or regulators.

To begin with, consumers are highly unlikely to have sufficient information to make meaningful assessments about the comparative merits of arbitration and litigation, let alone about their own rights under their credit card agreements. Virtually all consumers will lack necessary background knowledge about the benefits and costs of arbitration and judicial litigation as dispute resolution mechanisms. The vast majority of consumers' responses to the Bureau's proposed questions will almost certainly be premised on a lack of, or outright incorrect, information.[17] Vanishingly few respondents will have sufficient background information to assess the comparative merits of arbitration and litigation, because it is highly unlikely that more than a very few individual respondents will have had the experience of pursuing similar disputes in each forum. Because data about uninformed opinions leads to illogical conclusions,[18] perceptions and assessments based on faulty or inadequate information will not be relevant to (let alone probative of) whether regulating arbitration will serve the public interest.

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[14] Information Collection Request, Supporting Statement A at 6.

[15] *Id.*

[16] 5 C.F.R. § 1320.5(d)(1)(ii).

[17] Indeed, certain interest groups have affirmatively sought to create false perceptions of arbitration by advancing inaccurate or misleading information. As a result, respondents' perceptions and assessments may not track the reality of consumers' experience with arbitration as an effective dispute resolution mechanism.

[18] "There is little benefit policywise to representing inattentive and uninformed preferences; the policy consequences could be perverse." Stuart Soroka & Christopher Wlezien, *Public Opinion and Public Policy*, in John Courtney & David Smith, eds., *The Oxford Handbook of Canadian Politics* 263, 264 (2010).

There is, moreover, a risk that the unreliable data generated by the survey will be subject to misuse. As we explain further below, some of the proposed questions—especially those in Group Three—will not only burden respondents unnecessarily, but also create a risk that the resulting bad data will be manipulated.

Furthermore, the survey's attempt to "screen" for knowledge of dispute resolution systems (in question seven) simply will not work. Respondents are unlikely to report accurately their knowledge—or lack of knowledge—about these matters. Some respondents will not know that they lack sufficient information to provide a helpful response. Others will be unwilling to admit that they are wholly uninformed and will therefore select an intermediate response even though their actual awareness is negligible. Others will be misled by the survey instrument's design itself. One study found, for example, that the "numeric values presented to respondents" in a rating scale can have a "dramatic impact" on their response rates.[19] There, respondents were asked to rate how successful they have been at life using two different rating scales: 34% of respondents picked a low level of success on a scale from -5 to 5 (corresponding to "a value between -5 and 0"), while 13% picked an equivalently low level of success on a scale from 0 to 10 (corresponding to "values between 0 and 5").[20] The survey's inaccurate and rough screen for respondents' knowledge will, accordingly, under-represent the proportion of respondents who otherwise *know* that they lack sufficient information to provide a helpful response. That flawed approach is just one of the many pervasive shortcomings of the Bureau's proposed survey.

The Bureau should abandon its proposed survey, which by definition will not produce information relevant to the congressional mandate. Instead, it should research what matters by studying the objective facts regarding litigation and arbitration systems, as discussed in detail above.

II. If The Bureau Nonetheless Decides To Undertake A Consumer Survey, It Should Address Only Consumer Awareness of Dispute Resolution Provisions (The "Group Two" Questions).

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[19] Norbert Schwarz, *Self Reports: How the Questions Shape the Answers*, 54 Am. Psychologist 93, 95-96 (Feb. 1999).

[20] *Id.* at 96 (citing Norbert Schwarz et al., *Rating scales: Numeric values may change the meaning of scale labels*, 55 Pub. Op. Q. 570 (1991)).

In the previous section, we explained why the Bureau should withdraw its plan for a consumer survey that cannot possibly generate information relevant to the congressionally-mandated study—and therefore has no practical utility—and the Bureau instead should devote these taxpayer resources to studying the real-world performance of dispute resolution systems, particularly the extent to which the judicial litigation system actually provides a realistic option for vindication of consumer injuries and consumers are benefitted by the class-action system. If the Bureau nonetheless determines that its study of consumers' uninformed perceptions and assessments is relevant to the statutory study, the Bureau should limit its questions to address ***only*** consumer awareness of dispute resolution provisions in their credit card agreements.

For the reasons we respectfully offered above, such assessments and perceptions will remain irrelevant to answering the Dodd-Frank Act's mandated question. Yet limiting the questions in this portion of the study to consumer awareness of dispute resolution provisions would at least ask questions that consumers may be able to answer, as opposed to questions that focus on matters certain to be wholly outside the ordinary experience of consumers. Revising the questions in that way will minimize the unnecessary and unjustifiable burdens to respondents from answering questions that cannot produce any useful information.

Accordingly, questions should be limited to ascertaining consumers' knowledge of the dispute resolution provisions to which they have agreed. To provide useful information, such questions should measure knowledge against a baseline—such as other key provisions of the agreements—to determine whether consumers have more, less, or equivalent information about other aspects of the card issuer's credit services. It is critically important to have information about comparative baselines to put data about knowledge into context.

Consider a hypothetical survey result under which fewer than 10% of consumers could select among options, let alone volunteer, the correct answer of the forum in which a credit card agreement requires a dispute to be brought. That adds nothing of value without additional context. After all, credit card agreements have many provisions that are key components of the agreement. Whether dispute resolution provisions are more or less salient than other contract terms—including core price terms like interest rates and annual fees—cannot be assessed without addressing whether customers are aware of those other terms.

Without the comparative baseline that measures knowledge of other terms in the agreement, it would be impossible to gauge whether consumers pay greater, less, or the same attention to forum selection clauses as to other clauses important to them. And, to the extent there are differences, it is only by establishing a baseline that it might be possible to determine why any such differences exist. The Bureau should therefore ask about the relative importance of these various provisions to consumers when they are choosing between credit cards.

In the rest of this section, we address the major categories of questions that the Bureau has proposed asking respondents.[21] Where appropriate, we explain why the Bureau should revise a given question to increase the likelihood that this survey design will produce data that is of even minimal use—rather than data that is uninformative and even misleading as a basis for making public policy decisions.

A. Group One Questions

Questions One and Two. These questions, which appear intended to ask consumers to identify credit card issuers, are confusing and unlikely to elicit accurate information. For example, American Express and Discover cards typically are not issued by banks, but Question One asks about "bank credit cards" and then cites these two cards as examples—and does not cite Visa and Mastercard, which are issued by banks. Question Two asks about the "financial institution" that issued the credit card, a term that is likely to confuse consumers: is "financial institution" meant to capture what a consumer is likely to view as the "credit card company" (*e.g.*, Visa, Mastercard, American Express, Discover, etc.) or the name of the issuing bank (if any) or both? In order to obtain accurate information, these questions must be reformulated, both for accuracy and to frame the inquiries in terms that consumers are likely to understand.

Question Five. This question asks respondents to list their reasons for choosing a given credit card, if they remember. As we explain below, the Bureau should replace this question with an additional question or set of questions in Group Two, asking respondents about different material terms of the credit card agreement and whether any were the most important in their choice of cards.

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[21] *See generally* Information Collection Request, Appendix D.

B. Group Two Questions

Question Six. The Bureau has proposed two versions of Question Six (A and B); one half of respondents would hear one version, and the remaining half would hear the other. Version A presents a hypothetical question about the respondent being in a dispute with the credit card company, then asks the respondent whether "you believe you have the legal right to require that your dispute be decided in that way, even if the company wants something else." Version B asks the respondent "[h]ave you ever reviewed your cardholder agreement," then asks whether the respondent knows whether the agreement "discuss[es] how disputes should be resolved if customer service can't resolve them," and if so, what it says.

The Bureau should withdraw this proposal and instead use Version B for all respondents. Although the Bureau suggests that Version A is designed to elicit the "same information" as Version B, in fact Version A is highly unlikely to obtain reliable information. Unlike the objective question in Version B, Version A asks the respondent about subjective "belie[fs]" about what rights they have. For substantively the same reason as we presented above, most consumers are not likely to have this information, so any beliefs they have are likely to be uninformed.

Moreover, Version A is worded so as to allow respondents to offer their (subjective, uninformed) preferences for what rights they believe they *ought* to have, as opposed to the rights that they *do* have under the law. Most individuals are unlikely to be able to assess the existing legal regime and correctly articulate (without research) what rights they possess. The answer is further complicated by the fact that, in many consumer contracts, a customer has the right to choose between bringing claims in arbitration or in small claims court (assuming the claim fits within the jurisdiction of those courts, as most consumer disputes are likely to do). The accuracy of a customer's perceptions in this area surely cannot be determined in simplistic fashion—and certainly not without resort to a review of the relevant arbitration provision.

Additional Questions. As discussed above, one new question or series of questions should be added along the lines of Version B of Question Six. Respondents who respond that they have reviewed a card agreement should be asked about their knowledge of other key terms in the relevant agreement. For each key term, respondents could be asked if the agreement contains the term (per Version B, question (i)), and if so what the agreement says (per Version B, question (ii)).

The Bureau could easily define a set of key or material terms of credit card agreements for use in connection with this question. The Bureau has produced a website that defines common terms in credit card agreements.[22] In redesigning this question, the Bureau could elicit consumers' knowledge of other key common terms in their agreements by drawing from the list of definitions that it has already produced; that list presumably reflects what the Bureau considers the most material terms of a card agreement. Examples of such terms could include (a) the payment due date; (b) how interest is calculated; (c) the circumstances in which the cardholder defaults on the account; and (d) late payment penalties.

These are all examples of material terms of a credit card agreement. By gauging respondents' knowledge of other important provisions in credit card agreements, the Bureau can determine the baselines against which knowledge of dispute resolution provisions can be compared. It would then become possible to determine whether any limits to consumers' knowledge of dispute resolution provisions should be attributed to lack of attention to standard terms generally, or rather attributed to another reason specific to dispute resolution.

For a similar reason, the Bureau should add a question asking the relative importance of key, material agreement terms when they are choosing between different cards. A consumer may have an overriding preference or bundle of preferences that he or she seeks to maximize in choosing one product (such as a credit card) over another. Credit card users choose different cards for a variety of reasons, including (for example) their interest rates, annual fee, affinity (such as a college alumni organization credit card), minimum payment amount, and other benefits (such as cash-back, miles, or points).[23] Perhaps some respondents will choose among cards based on the dispute resolution provision in the card agreement; for these respondents, the variability in the market will permit them to choose among card agreements that offer arbitration provisions and those that do not. But many other cardholders' preferences will be relatively agnostic vis-a-vis the card agreement's dispute resolution provision—that is, they will choose among

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[22] *See* Consumer Financial Protection Bureau, *Credit Card Contract Definitions*, *available at* http://www.consumerfinance.gov/credit-cards/definitions/.

[23] *See, e.g.,* Jinkook Lee and Jeanne M. Hogarth, *Returns to Information Search: Consumer Credit Card Shopping Decisions*, 10 Fin. Counseling & Planning 23, 32-34 (1999); Steve Worthington & Suzanne Home, *Relationship Marketing: The Case of the University Alumni Affinity Credit Card*, 12 J. Mktg. Mgmt. 189 (1996).

cards based on another factor and will be more or less indifferent to various cards' dispute resolution provisions when selecting among them.[24]

The only way the Bureau can meaningfully measure the salience of dispute resolution as consumers' reason for choosing a card is to examine and contrast the other reasons. If consumers have low salience of dispute resolution terms—i.e., they respond showing limited knowledge of those terms and limited interest in selecting among cards on the basis of the dispute resolution terms—studying the salience and ranked preference regarding other terms will be critical for understanding why those customers do not understand their dispute resolution provisions.

C. Group Three Questions

The next group of questions inquires into consumers' views about different dispute resolution systems. The Bureau's survey should not seek consumers' uninformed assessments or preferences in this area. Even consumers who have experience with arbitration do not have sufficient knowledge to provide informed views about the comparative merits of different dispute resolution systems. Those consumers who have never presented a dispute in arbitration are likely to have even less preexisting knowledge with which to make an informed and helpful assessment. And the number of respondents with experience concerning *both* arbitration *and* litigation is likely to be extremely small—indeed, it is likely to be zero.

Moreover, although the Bureau can only gather relevant and useful preferences from those consumers who have adequate preexisting information to have informed views, there is no way for the Bureau effectively to screen out uninformed consumers. Asking consumers to screen themselves is unlikely to help, because respondents who are as a threshold matter likely to be uninformed about dispute resolution systems are unlikely to be able to evaluate the extent to which they are informed or uninformed dispute resolution. For the same reason, attempting to have consumer respondents list "features" of dispute resolution that appeal to them would not provide sufficiently informed responses. And the Bureau certainly cannot formulate neutral descriptions of both systems that consumers could then use as a basis for making comparative

[24] This additional question is essential to the extent the Bureau is seeking to determine the relevance of dispute resolution provisions to consumer choice, because that issue cannot be ascertained based upon an agreement's current dispute resolution provision—the consumer may have made his or her choice when the dispute resolution provision was different from what it is at the time the survey questions are answered.

judgments—such descriptions would have to be quite detailed (and therefore lengthy), and the very process of identifying the characteristics of the two systems would necessarily require the very empirical assessments that the statutory study must embody, as discussed above.

If the Bureau continues to include the questions in Group Three, its survey is likely to generate wholly unreliable data. Third party groups may latch on to unreliable data and misuse it to skew the public policy debate about pre-dispute arbitration agreements. For example, consumers' uninformed views about dispute resolution could result in data that consumers believe counterfactually that arbitration is slower and more expensive than litigation, and leads to worse outcomes. Or it could result in data purporting to "show" the opposite. Although such data would lack external validity because it is based on a flawed survey and on a flawed, uninformed sample, nothing would stop others from using the data inappropriately and irresponsibly if it were to be released.

The Group Three questions therefore risk creating an unnecessary burden on respondents without any corresponding benefit for the Bureau in answering the Dodd-Frank Act's mandated question. Accordingly, we strongly urge the Bureau to withdraw these proposed questions in light of the certainty that they will not produce useful information—and are nearly certain to produce misleading information—due to consumers' lack of knowledge about dispute resolution systems.

In addition to this fundamental flaw pervading all of these questions, there are additional problems with the individual questions.

Question Seven. This question seeks to elicit the level of the respondent's familiarity with consumer arbitration and consumer litigation, and to identify the "important features" of proceedings in each forum, if possible. But this question will not produce reliable information. Respondents are unlikely to admit that they know nothing about, for example, "bringing . . . claims in court"—even though very few laypersons are well informed about litigation in the judicial system. Many responses are likely to be based on conjecture, surmise, and popular culture understandings of court (for example, from television shows) as compared to reality.

Question Eight. This question purports to address consumer perceptions of the transaction costs of dispute resolution, by asking the respondent how big a claim would

have to be before it would be worth it to sue in small claims or state and federal court, to bring a claim in arbitration, or to submit a claim form in a class action. In order to be effective, the question would have to be preceded by information regarding the costs of filing claims or proceeding with litigation in each forum, as well as any incentives available as part of a consumer-friendly arbitration agreement (such as a guaranteed minimum recovery or fee shifting). Without such information, consumers are unlikely to provide anything but an un-, or at the minimum, under-informed guess. And the Bureau has not even tried, and could not in any event, create a short, understandable description of the two dispute resolution systems that all stakeholders will perceive to be fair. Any such description would to a very significant degree influence consumers' answers (because it would be their sole source of information) and therefore produce wholly unreliable results.

An additional and equally problematic flaw of the question as phrased is that it presents transaction costs in a leading manner. The question contrasts the opportunity cost of filling out a class action claims form and the cost of mailing it, against the costs of filing a new claim in arbitration, small claims court, or state or federal courts. Where covered persons and other businesses have adopted consumer-friendly arbitration provisions like the one the Supreme Court described favorably in *AT&T Mobility v. Concepcion*,[25] consumers may find that the cost of pursuing a claim is more favorable than proceeding in court or in being part of a class action that pays only minimal benefits. Certainly their anticipated recovery may be much higher in arbitration than if they had to wait for an uncertain payout from a class-action common fund.

Asking whether a respondent would submit a class action claim form is an especially powerful example of why it is a mistake to ask about perceptions rather than reality. Asking hypothetical questions about hypothetical claim forms in hypothetical class actions results only in useless speculation. And such speculation is unnecessary because there has been a long history of class actions that are settled on a claims-made basis. The claims rate is or could be known (sometimes to courts, sometimes only to

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[25] 131 S. Ct. 1740 (2011). In *Concepcion*, the Court reasoned that the consumers' "claim . . . was most unlikely to go unresolved." *Id.* at 1753. Because "the arbitration agreement provides that AT&T will pay claimants a minimum of $7,500"—now $10,000—"and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer," the arbitration agreement "essentially guarantee[s]" that consumers will be "made whole." *Id.* (citation omitted). "Indeed," the Court reported, the claimants "were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action, which 'could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.'" *Id.*

counsel and claims administrators) in those cases. Why survey what people might do when there is a track record of what they actually have done? Moreover, if the Bureau were to go forward with such a question, it would need to make the assumptions clear to respondents, including information about the nature of the hypothetical claim, the potential recovery available for the claim, and how the hypothetical class counsel would be compensated.[26]

Question Nine. This question purports to establish whether a respondent would be "willing" to pursue a claim *pro se* in court or in arbitration, with and without regard to whether the company would be represented by a lawyer. Because this question does not ask whether the respondent would be "able" to pursue a claim *pro se* under each of the circumstances presented, the question is not likely to elicit useful information. In part, that is due to the overall information deficit we described above: those respondents who are not familiar with arbitration's relative informality may not recognize that they can effectively pursue their claims without an attorney. Such respondents, therefore, may not report that they would be *willing* to pursue a claim in arbitration without an attorney, even if they would be able to do so.

Question Ten. This question purports to address consumers' perceptions of the fairness of different dispute resolution mechanisms. It does so by asking respondents to rate on a 0-5 scale the extent to which they think arbitration, court adjudication, or a class settlement would dispose of the case fairly.

This question is unrealistic because it assumes that a respondent may obtain a decision on the merits in court as easily, readily, and cheaply as before an arbitrator, which on the whole, the empirical studies report, is not the case.[27] And with respect to the class action settlement option, it is unrealistic for other reasons, including its assumption that a class action would result in a full recovery rather than a partial recovery. Some consumers will determine that an expected recovery in a class-action settlement is too small and too speculative to justify the effort of returning a claim form.

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[26] It may also be necessary to obtain demographic information about the respondents. As one class action claims administrator has noted, "professional, relatively wealthy class members typically would consider certain benefits too small to be worth the time required to file a claim. The converse is often also true." Tiffaney Allen, *Anticipating Claims Filing Rates in Class Action Settlements*, Rust Consulting (Nov. 2008), available at http://www.rustconsulting.com/Legal_Sector_Knowledge_Sharing/Articles_and_Publications/articleType/ArticleView/articleId/124/Anticipating_Claims_Filing_Rates_in_Class_Action_Settlements.aspx.

[27] *See* note 13 and accompanying text.

Other consumers will seek to share in a settlement fund without regard to the fairness of the procedure.[28] Still others may judge the fairness of the procedure based on the ease of filling out the claim form and the size of the possible share compared against the size of the claim. Finally, the question is flawed because it omits any assessment of the fairness of proceeding in small claims court, which remains an option for many consumers who have entered into pre-dispute arbitration agreements.

Question Eleven. This question purports to elicit the amount consumers are willing to accept to commit to a pre-dispute arbitration agreement containing a class-action waiver. But it is flawed in two fundamental ways.

To begin with, the question is facially biased. The option for Card B is described as giving the respondent the power to force the card company into arbitration, "even if the other side wants to have the disputes decided in court." The term "force" is used only in connection with arbitration, and Card A is not described as preventing arbitration proceedings—which would be the case in the real world, where the possibility of post-dispute arbitration agreements is illusory. In addition, Card A is described as permitting the customer to sue the company in court, but omits that the company could also sue the customer in court.

There is another more fundamental problem in addition to the question's bias. The question is based on an entirely unrealistic assumption—that the consumer will have one card and be unable to switch for several years. Neither condition is likely to be the case.

D. Group Four Questions

Question Twelve. The last question addresses respondents' experience with litigation and arbitration, and the outcomes they received in each forum. Given the small number of consumers with experience with either dispute resolution system, it is inconceivable that this question will generate statistically significant results. It therefore should be omitted from the study.

This question is also framed in a way that assures unreliable results. *First*, it should ask not only whether respondents have participated in a class action "by filing a claim,"

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[28] *See* note 26.

but also whether respondents recall having *ever* received a class action settlement notice for which they did not ultimately file a claim. If the question is limited to participation by filing a claim, the survey is likely to inflate falsely the proportion of respondents who participate in class actions. By the same token, the survey is likely to underreport respondents who find class action settlement notices not to be worth their time, or who consider the class actions for which they have received notices to have provided suboptimal outcomes for them. *Second*, the question should ask about mediation or arbitration, rather than solely arbitration. Arbitration is virtually always accompanied by a prior process of mediation or informal negotiation and most claims are resolved to the consumers' satisfaction through mediation or other pre-arbitration negotiations. Ignoring these successful uses of the non-litigation dispute resolution process will produce skewed and inaccurate results.

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We thank you for your consideration of these comments and would be happy to discuss these issues further with the Bureau's staff.

Sincerely,

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